Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC.

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Introduction and Summary

McCaw Cellular Communications, Inc. ("McCaw") hereby submits its reply comments in response to the Notice of Proposed Rulemaking ("Notice")[1/] in the above-captioned proceeding.

The market for commercial mobile services is already competitive, and recent announcements of acquisitions and technical developments confirm that the marketplace will become even more competitive in the next few years. The 200 MHz of spectrum recently authorized for emerging technologies plus the 220 MHz made available for personal communications services -- in total, more than eight times the spectrum allocated for cellular -- ensures the rapid growth of mobile services in the coming years.

[1/] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, FCC 93-454 (rel. Oct. 8, 1993).

In such an unconcentrated market, where no provider controls bottleneck facilities or has captured more than five percent of potential subscribers, there is no justification for creating or retaining regulatory disparities that Congress intended to remove. Despite some self-serving commentary to the contrary, the record supports broad forbearance from Title II regulation, including tariff filing requirements, for all providers of commercial mobile services. All such providers should also be given the flexibility to offer both private and commercial mobile services. Conversely, there is no basis for mandating that commercial mobile service providers provide interconnection to other providers of mobile or landline services.

In a bid to retain expansive regulatory authority, the few states that participated in this proceeding argue that the market for commercial mobile services is not competitive. Their claims are without evidence and contrary to the record amassed here. The overwhelming majority of commenters in this proceeding recognize that limiting state regulatory authority is consistent with the level of competition in the marketplace and is essential to the sustained growth and nationwide development of commercial mobile services. Given the inherently interstate nature of mobile services, reflected in the decision to license PCS on the basis of "major trading areas" that cross state lines, Federal jurisdiction is the most appropriate regulatory locus.

To assure equivalent regulatory treatment of comparable mobile services, the Commission should, as most commenters

recommend, adopt a broad definition of the statutory term "commercial mobile service." Otherwise, providers of comparable services will continue to seek competitive advantages by pursuing "private" regulatory status.

I. Competitive Market Conditions Justify Minimal Regulation of the Commercial Mobile Service Market

The record in this proceeding confirms that the commercial mobile services market is competitive and, with the imminent market entry of multiple new services and providers, will become more competitive in the future. Commenters who call for greater regulation of "existing" providers of these services argue, without foundation, that some mobile service licensees exercise market power and must be subjected to tariffing and interconnection requirements hitherto reserved for dominant landline carriers. The attempted analogy cannot withstand scrutiny. Unsupported by the facts and contrary to statutory intent,[2/] these predictable efforts to maintain the status quo of regulatory disparity must be dismissed. Rather, the record supports broad forbearance from Title II regulation, including tariff filing requirements, for all providers of commercial mobile services. All such providers should also be given the flexibility to offer both private and commercial mobile services.

[2/] H.R. Rep. No. 111, 103d Cong., 1st Sess. 259-60 (1993) [hereinafter "House Report"].

A. The Market for Commercial Mobile Services is Competitive

Based on the record before the Commission in this and related proceedings,[3/] there can be little doubt that the market for commercial mobile services is competitive. There are multiple cellular, paging, and special mobile radio ("SMR") licensees, which compete against one another.[4/] Within the mobile services marketplace, no single provider possesses market power sufficient to impede competition. The penetration levels of existing mobile service providers are low, providing considerable running room for newly authorized services, such as enhanced SMR, expanded mobile service, satellite mobile service, and personal communications service that will engender additional competition in the burgeoning commercial mobile services market.[5/]

While a few commenters claim that the commercial mobile services market is insufficiently competitive to permit

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[3/] See Cellular Telecommunications Industry Association Petition for Waiver of Part 61 of the Commission's Rules, 8 FCC Rcd. 1412 (1993).

[4/] See, e.g., Comments of the Cellular Telecommunications Industry Association, GN Docket No. 93-252, at 33 [hereinafter "CTIA Comments"]; Comments of Vanguard Cellular Systems, Inc., GN Docket No. 93-252, at 15; Comments of Motorola, Inc., GN Docket No. 93-252, at 17-18 [hereinafter "Motorola Comments"]; Comments of GTE Service Corporation, GN Docket No. 93-252, at 15 [hereinafter "GTE Comments"].

[5/] Comments of McCaw Cellular Communications, Inc., GN Docket No. 93-252, at 7 [hereinafter "McCaw Comments"].

regulatory forbearance,[6] the record in this proceeding demonstrates otherwise.[7] Indeed, beyond the flat assertion that the market is not competitive, these commenters can offer no evidence of collusive pricing, anticompetitive marketing practices, or other misconduct.[8] To the contrary, in view of the mobile service providers' lack of market power, most states have either deregulated the commercial mobile services market or adopted streamlined regulation.[9]

Some private mobile service providers have questioned the competitiveness of the commercial mobile services market,[10] but

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[6] See Comments of The People of the State of California and the Public Utilities Commission of the State of California, GN Docket No. 93-252, at 5-8 [hereinafter "CPUC Comments"]; Comments of New York State Department of Public Service, GN Docket No. 93-252, at 11 [hereinafter "NYSDPS Comments"]; Comments of the National Cellular Resellers Association, GN Docket No. 93-252, at 3-4 [hereinafter "NCRA Comments"].

[7] The vast majority of commenters support the Commission's conclusion that the commercial mobile services market is competitive. E.g., McCaw Comments at 7-8; Comments of NYNEX Corporation, GN Docket No. 93-252, at 18-19 [hereinafter "NYNEX Comments"]; CTIA Comments at 2; Comments of Rig Telephones, Inc., GN Docket No. 93-252, at 3-4; GTE Comments at 14-15; Comments of US West, Inc., GN Docket No. 93-252, at 26-26; Comments of The Bell Atlantic Companies, GN Docket No. 93-252, at 23 [hereinafter "Bell Atlantic Comments"].

[8] See CPUC Comments at 7; see also NYSDPS Comments at 11 (declaring, without elaboration, that the market for commercial mobile services is not competitive).

[9] Notice at ¶ 63 (noting that "few states have seen the need to regulate cellular rates"); see also NYNEX Comments at 19 n.26 (citing Cellular Telecommunications Industry Association finding that 42 states have deregulated mobile services). It is also significant that only a few states saw the need to even participate in this proceeding.

[10] See Comments of Nextel Communications, Inc., GN Docket No. 93-252, at 21 [hereinafter "Nextel Comments"].

their own recent actions belie these unsupported assertions. Nextel's acquisition of Motorola's dispatch properties will provide it with access to 180 million people across 21 states -- a potential subscriber base three times greater than the largest commercial mobile service provider.[11/] With an established presence in most metropolitan markets, Nextel plans to offer an interconnected mobile service that rivals conventional cellular service and, according to news accounts, should "whip wireless competition into a frenzy."[12/] According to one report, "Besides carrying ordinary voice conversations, as cellular does, the new Nextel networks would offer built-in paging and data communications -- features not available with most current cellular service."[13/]

The activities of Nextel, Motorola,[14/] and others illustrate the increasingly competitive nature of the mobile services marketplace, in which new and established participants can and do develop alternatives to cellular and other existing commercial mobile services. With low barriers to entry and the increasing

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[11/] G. Naik, Nextel's Deal with Motorola Advances Wireless Vision, Wall St. Journal, Nov. 10, 1993, at B4.

[12/] K. Maney, New Wireless Phone Option Answers Call, USA Today, Nov. 12, 1993, at B1.

[13/] E. Andrews, A Wireless Upstart Gets Bigger, N.Y. Times, Nov. 10, 1993, at D1, D5.

[14/] Through transactions with Nextel and other commercial mobile service providers, Motorola now holds a 20 percent interest in Nextel, a 30 percent in CenCall Communications, and a 34.5 percent interest in Dial Page. G. Naik, Nextel is Said to Buy Licenses from Motorola, Wall St. Journal, Nov. 9, 1993, at A3.

sophistication of mobile service technologies, the market for commercial mobile services can only become more competitive. The 200 MHz of spectrum recently authorized for emerging technologies[15] plus the 220 MHz made available for personal communications services -- in total, more than eight times the spectrum allocated for cellular -- ensures the rapid growth of mobile services in the coming years. To impose disparate regulation on some of the participants in this marketplace is unsupported by the facts and contrary to statutory intent. Such a course would only inhibit the growth and development of commercial mobile services.[16]

B. Given the Competitive Nature of the Commercial Mobile Services Marketplace, the Statute Requires Equivalent Treatment of Comparable Commercial Mobile Services

In establishing a comprehensive scheme for the regulation of mobile services, Congress provided specific criteria to determine the extent to which Title II regulation should apply to commercial mobile services. Proposals that attempt to distinguish between "dominant" and "non-dominant" providers of mobile services,[17] rather than testing the need for regulation against the statutory criteria, miss the mark. These distinctions are rooted in the wired marketplace, where

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[15] 47 U.S.C. § 911 et seq., added by Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, § 6001.

[16] E.g., Comments of PageMart, Inc., GN Docket No. 93-252, at 13 (noting that regulation of competitive services increases the cost of service) [hereinafter "PageMart Comments"].

[17] See NYSDPS Comments at 10.

entrenched monopolies control a dominant share of all potential customers in the market. Such distinctions are not applicable to the wireless industry, where nascent providers have single digit shares of potential customers. The Regional Bell Operating Companies ("RBOCs"), for example, still command virtually 100 percent of exchange service in their regions with penetration levels of approximately 94 percent, and are rightly tagged with the "dominant" label. In contrast, McCaw, the country's largest cellular carrier, has never served more than five percent of the potential subscribers in its cellular market.

Within the regulatory framework for commercial mobile services, providers may be exempted from Title II regulation if enforcement of such regulation is unnecessary to ensure just, reasonable, and non-discriminatory rates and to protect consumers, and if forbearance is otherwise consistent with the public interest.[18/] Because all commercial mobile services satisfy these criteria, there is no justification for the Commission to establish regulatory subcategories of commercial mobile services or providers.[19/] Indeed, reimposing disparate regulatory requirements under current market conditions will only inhibit the growth and development of the commercial mobile services market.[20/]

[18/] See 47 U.S.C. § 332(c)(1)(i)-(iii).

[19/] See, e.g., US West Comments at 28; CTIA Comments at 30-31.

[20/] See House Report at 259-60.

Proposals to impose disparate regulatory requirements among subcategories of commercial mobile service providers represent transparent attempts to preserve or extend existing regulatory advantages.[21/] Nextel, for instance, proposes a distinction between "established" and other mobile service providers.[22/] Such a distinction would serve no useful purpose because no provider, "established" or otherwise, possesses market power or controls bottleneck facilities. Given the emerging nationwide competition among providers of wireless services, including Nextel, there is no need to handicap the market in favor of "new" entrants. In this regard, it is worth noting that Congress specifically considered and rejected a proposal to authorize the imposition of disparate regulatory requirements on existing providers and "new [market] entrants."[23/]

Similarly, there is no justification for imposing mandatory interconnection requirements on providers of commercial mobile services, since no such provider exercises "bottleneck" control

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[21/] See, e.g., Comments of CenCall Communications Corporation, GN Docket No. 93-252, at 5-12 (contending that, if enhanced SMRs are found to be commercial mobile service providers, they should be singled out for especially lenient regulatory treatment).

[22/] See Nextel Comments at 21-22; see also Comments of National Association of Business and Education Radio, GN Docket No. 93-252, at 13-14 [hereinafter "NABER Comments"].

[23/] See Conference Report at 490-91.

over essential facilities.[24] Requiring licensees to furnish interconnection to third parties would inhibit the growth of commercial mobile services by discouraging investment in mobile facilities.[25] Mandatory interconnection would also be incompatible with the current network architecture and would likely produce an "accounting nightmare."[26]

The Commission should devote its attention to strengthening the interconnection obligations of local exchange carriers ("LECs").[27] Interconnection requirements are appropriately imposed on the LECs, whose local exchange monopolies constitute

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[24] Thus, because commercial mobile service providers are not in a position to deny access to the public switched network, there is no need to impose an interconnection obligation upon them. Compare Comments of RAM Mobile Data USA Limited Partnership, GN Docket No. 93-252, at 8 [hereinafter "RAM Mobile Data Comments"].

If the Commission wishes to ensure interoperability among commercial mobile systems, to permit roaming and the intersystem hand-off of calls, it can do so through the standards setting process.

[25] Such a policy would permit some carriers to take advantage of the substantial investments that others have made in their mobile service facilities, giving them a "free ride" that would only discourage future investment. There is apparently no limit to how far these free riders would go, if given the chance. See Comments of Grand Broadcasting Corporation, GN Docket No. 93-252, at 6-7 (demanding access to cellular carrier facilities, including antennas, receivers, transmitters, data and control signalling, processing equipment, power amplifiers, cell site controllers, and back-up power equipment).

[26] Comments of Southwestern Bell Corporation, GN Docket No. 93-252, at 30-31 [hereinafter "Southwestern Bell Comments"].

[27] For instance, as several commenters have proposed, the Commission should use this proceeding to require LECs to compensate commercial mobile service providers for terminating calls originated on the landline network. See, e.g., Comments of Time Warner Telecommunications, GN Docket No. 93-252, at 9.

the quintessential "bottleneck" facility to which providers of commercial mobile services need access.[28] Where such bottlenecks exist, mandatory interconnection is an essential prerequisite to a competitive market.[29]

The Commission should also reject self-serving efforts to entangle commercial mobile service providers in other unwarranted and excessive regulation.[30] The National Cellular Resellers

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[28] See id. at 8 ("[T]he Commission must deal with the reality that local exchange switching is still a bottleneck, and control of that bottleneck can inhibit the growth of new and useful telecommunications services.").

[29] Compare Southwestern Bell Comments at 29 ("Part 22 providers are not the interconnectors and franchised local providers of last resort.") with Bell Atlantic Comments at 40 (supporting a mandatory interconnection obligation regardless of need or demand for interconnection).

There is no justification for imposing interconnection, separate subsidiary, or special accounting requirements on mobile service providers other than those affiliated with dominant local exchange carriers that are in a position to deny competitors access to the public switched network. Some commenters have suggested that similar requirements be imposed on McCaw in light of its proposed merger with AT&T. See, e.g., Comments of In-Flight Phone Corporation, GN Docket No. 93-252, at 5 n.5; Comments of Comcast Corporation, GN Docket No. 93-252, at 16-17 [hereinafter "Comcast Comments"]; CPUC Comments at 8. The imposition of these requirements has historically been a reaction to the market power and bottleneck control exercised by local telephone companies. Unlike a local exchange carrier, AT&T does not control access to the facilities used by commercial mobile service providers for access to the public switched network. In any event, the Commission is presently reviewing the proposed AT&T/McCaw transaction in a separate proceeding. See File No. ENF-93-44. Any regulatory issues associated with the transaction should be addressed in that context.

[30] For this reason, McCaw again urges the Commission to forbear from applying Sections 223, 225, 227, and 228 of the Communications Act and, in particular, the Telephone Operator Consumer Services Improvement Act, 47 U.S.C. § 226. See McCaw Comments at 11. There is no demonstrated need to apply these (continued...)

Association ("NCRA"), for instance, seeks a guaranteed profit margin for its members by proposing the imposition of wholesale rate regulation.[31] As the Commission is aware, however, cellular carriers are already obligated to permit the resale of their service.[32] The additional imposition of pervasive rate regulation is fundamentally inconsistent with the prevailing competitive market conditions and the Congressional goal of removing obstacles to competition between private carriers and functionally equivalent commercial carriers.[33]

Likewise, the Commission should not relax the evidentiary standards associated with Section 208 complaints. By authorizing the Commission to forbear from applying Title II regulation to commercial mobile service providers, Congress relied on competition to assure the availability of service at just,

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[30](...continued)
provisions to commercial mobile services providers, and, if the need should arise, the Commission may "unspecify" the relevant provisions of the Act. See also GTE Comments, 17-19; Motorola Comments at 20.

[31] NCRA Comments at 17-18.

[32] Cellular Communications Systems, 86 F.C.C.2d 469, 511 (1981); see In re Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 7 FCC Rcd. 4006 (1992) (Report and Order).

[33] For these reasons, the Commission should also reject a proposal to impose exit regulation on commercial mobile service providers. CPUC Comments at 3. In a competitive market, providers enter and exit the market in response to consumer demand. Requiring a commercial mobile service provider to obtain regulatory approval prior to exiting the market would impose an undue regulatory burden that will serve only to hamper competition.

reasonable, and non-discriminatory rates.[34] In the unlikely event that market conditions subsequently become substantially less competitive, the Commission is empowered to reorder the competitive landscape by "unspecifying" previously forborne provisions of Title II. Relaxing the evidentiary standards associated with Section 208 complaints, as NCRA proposes, is unlikely to enhance competition in the commercial mobile services market as much as encourage unfounded complaints.[35]

Finally, while several commenters urge the Commission to impose "equal access" requirements on commercial mobile service providers,[36] the present proceeding is not the appropriate forum in which to address the complex issues at stake.[37] The Commission is already considering a rulemaking petition by MCI concerning the equal access obligations of cellular carriers.[38] Because that proceeding is focused specifically on the equal access issue, and is not governed by the strict time deadlines in

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[34] See 47 U.S.C. § 332(c)(1)(A).

[35] For instance, NCRA would compel the Commission to administer a full-blown complaint proceeding, and require the carrier to cost-justify its rates, based not on evidence of unjust and unreasonable rates but on "bona fide questions of lawfulness" -- a fundamentally vague but admittedly "liberal" standard. NCRA Comments at 19.

[36] E.g., Bell Atlantic Comments at 40; Comments of BellSouth Corporation, GN Docket No. 93-252, at 34.

[37] See Comments of the Illinois Valley Cellular RSA 2 Partnerships, GN Docket No. 93-252, at 4.

[38] MCI Telecommunications Corporation Petition for Rule Making, Policies and Rules Pertaining to the Equal Access Obligations of Cellular Carriers, RM-8012 (filed June 2, 1992).

operation here, resolution of the equal access issue is best addressed there. Whatever action the Commission ultimately takes, however, it should apply any equal access requirements in a consistent fashion to all commercial mobile service providers to satisfy the Congressional goal of regulatory parity.

C. The Commission Should Permit All Commercial Mobile Service Providers to Offer both Private and Commercial Mobile Services

To assure regulatory parity in the competitive commercial mobile services market, the Commission should permit all providers to offer both private and commercial mobile services. The Commission enjoys substantial discretion to authorize such licensee self-designation.[39/] Moreover, while several commenters oppose licensee choice in whole or in part, there are, in fact, no insuperable barriers to its implementation.

Predictably, objections to licensee self-designation usually are little more than self-serving attempts to gain or preserve competitive advantage through disparate regulation. Thus, the American Mobile Telecommunications Association ("AMTA") contends that its members should be permitted to offer both private and commercial mobile services, but argues that affording cellular carriers and other existing commercial mobile service providers similar regulatory flexibility would jeopardize the availability

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[39/] See CTIA Comments at 18 n.42; Comments of Century Cellunet, Inc., GN Docket No. 93-252, at 4.

of those services.[40] The Commission has already determined, however, that cellular carriers may provide auxiliary services without undermining the availability of cellular service.[41] Thus, to permit some carriers but not others to offer both private and commercial mobile services would simply distort the marketplace by maintaining regulatory disparities.[42]

The Commission should also reject requests to preserve, for three years or longer, the prohibition against the provision of dispatch services by common carriers.[43] The three-year transition was not, as suggested by AMTA and others, designed to provide private carriers with an additional three years in which to seek competitive advantage from disparate regulation.[44]

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[40] Comments of American Mobile Telecommunications Association, Inc., GN Docket No. 93-252, at 17-18 [hereinafter "AMTA Comments"].

[41] Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, 3 FCC Rcd. 7033 (1988).

[42] While US West proposes to categorize all licensees that provide both private and commercial mobile services as "commercial mobile service" providers, US West Comments at 23, that proposal would disregard the statutory distinction between private and commercial mobile services. If a commercial mobile service provider offers private mobile services, it should be regulated as a private carrier to the extent of its private carrier offerings.

[43] For instance, Nextel urges the Commission to defer consideration of the issue to a subsequent rulemaking "after the three-year transition period." Nextel Comments at 19-20; see also Comments of Geotek Industries, Inc., GN Docket No. 93-252, at 4 n.7 [hereinafter "Geotek Comments"].

[44] See AMTA Comments at 22; Comments of E.F. Johnson Company, GN Docket No. 93-252, at 11 [hereinafter "E.F. Johnson Comments"]; Nextel Comments at 19.

Instead, it was intended simply to permit previously unregulated private carriers time to comply with common carrier regulation.[45] Because no statutory purpose is served by delaying existing common carriers from offering dispatch services, the Commission should immediately repeal the prohibition.

II. The Record in this Proceeding Overwhelmingly Supports Limiting State Regulation of Commercial Mobile Services

In a market as dynamic and competitive as the mobile services market, the imposition of disparate state regulatory requirements would undermine Congress's efforts to establish a comprehensive mobile service policy that reflects the inherently interstate nature of mobile services. Thus, while several commenters argue that state regulation is necessary,[46] their claim fails to recognize the interstate nature of mobile service,[47] the competitiveness of the mobile services market,

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[45] House Report at 262; Conference Report at 497-98; see also 139 Cong. Rec. H6163 (daily ed. Aug. 5, 1993) (statement of House Telecommunications Subcommittee Chairman Markey).

[46] Comments of the District of Columbia Public Service Commission, GN Docket No. 93-252, at 12 [hereinafter "DCPSC Comments"; CPUC Comments at 6.

[47] Reflecting the technological impossibility of confining radio-based mobile services to a single state, the geographic areas to which such services are licensed do not conform to state boundaries. For example, the Metropolitan Trading Areas ("MTAs") recently adopted for PCS licensing do not recognize state boundaries, and 47 of cellular's Metropolitan Statistical Areas ("MSAs") cross state lines.

and the impending entry of additional commercial mobile service providers.[48/]

McCaw and most other commenters support the Commission's proposal to exercise plenary jurisdiction over the right to and type of interconnection of mobile carrier facilities to the public switched network.[49/] Because mobile services, "by their nature, operate without regard to state lines,"[50/] the adoption of multiple and inconsistent interconnection policies by the states would negate the important federal purpose of ensuring interconnection to the interstate network.[51/] Indeed, as even the District of Columbia Public Service Commission ("DCPSC") recognizes, preemption of state authority over interconnection is essential to promoting the development of a seamless interstate telecommunications infrastructure.[52/] The Commission should therefore adopt its proposal to preempt state regulation of the

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[48/] See Section I, supra; see also Motorola Comments at 20; Comcast Comments at 10; Comments of The Rural Cellular Association, GN Docket No. 93-252, at 8.

[49/] McCaw Comments at 32; AMTA Comments at 21; Comments of Paging Network, Inc., GN Docket No. 93-252, at 25 [hereinafter "PageNet Comments"]; CTIA Comments at 40.

[50/] House Report at 260.

[51/] Notice at ¶ 71.

[52/] DCPSC Comments at 10; see also House Report at 261 ("interconnection serves to enhance competition and advance a seamless national network") (emphasis supplied).

right to interconnection and the right to specify the type of interconnection.[53]

The record in this proceeding supports the granting of state petitions for rate regulatory authority in only the most limited of circumstances.[54] As McCaw demonstrated in its initial comments, Congress envisioned a state's exercise of this authority only in extreme cases of significant market failure.[55] Given the interstate character of mobile services, a patchwork of inconsistent state regulation would inhibit their growth and nationwide development.[56] The Commission should reject proposed petition standards that would permit state regulation as a matter of course[57] and require instead that the states bear the burden of demonstrating the need for regulation through evidence of anticompetitive behavior and consumer harm.[58] Even in those few

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[53] See Notice at ¶ 71 ("[W]e tentatively conclude that permitting state regulation of the right to interconnect and the type of interconnection for intrastate service would negate the important federal purpose of ensuring interconnection to the interstate network.")

[54] E.g., Bell Atlantic Comments at 41; GTE Comments at 24; NABER Comments at 17.

[55] McCaw Comments at 22-23; see 47 U.S.C. § 332(c)(3); see also House Report at 260.

[56] McCaw Comments at 22-23.

[57] See, e.g., NCRA Comments at 24-25; DCPSC Comments at 12-13.

[58] A petitioning state should also offer proof that ad hoc state regulation is a better means of protecting consumers than a uniform Federal policy. In addition, because excessive regulation may inhibit market competitiveness, a state should also be required to demonstrate the need for additional regulation if it already regulates commercial mobile services.

instances where a state can justify rate regulation, the Commission should limit the state's exercise of regulatory authority so that it does not undermine the overall intent of the statute.[59/] Finally, the Commission should not permit the states to regulate rates indirectly under the guise of regulating the "terms and conditions" of commercial mobile service.[60/]

III. The Record Supports the Broad Definition of "Commercial Mobile Services" Intended by Congress

The comments in this proceeding provide abundant support for a broad definition of "commercial mobile service," which is essential to the statutory goal of assuring equivalent regulation of comparable mobile services. The Commission should reject narrower definitions of "commercial mobile service" that would result in disparate regulation of comparable services.

A. Any Service Offered For Profit, in Whole or in Part, Including Shared-use Arrangements Employing a For-Profit Manager, is Provided "For Profit"

The legislative history and statutory language clearly demonstrate that Congress intended the "for-profit" element of its definition to encompass any mobile service that is offered for profit. Some commenters propose to exclude shared and multiple-licensed systems, including for-profit third-party

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[59/] McCaw Comments at 24-25; see also 47 U.S.C. § 332(c)(3)(A), (B).

[60/] McCaw Comments at 27-28.

managers, from the for-profit definition.[61] Likewise, Motorola and NABER propose to exclude providers that are "not principally engaged in for-profit service" or operating substantially[62] on a non-profit basis and to include only service providers whose primary service is offered for profit.[63]

These proposed exceptions for some for-profit services would open the way for regulatory disparities among comparable services, inconsistent with statutory intent. A commercial mobile service is any service offered on a for-profit basis.[64] An artificially narrow definition of "for-profit" would create incentives to package commercial mobile service offerings with non-profit services in order to avoid having any of the services classified as commercial mobile.

As the Commission recognizes, the statute establishes a broad distinction between for-profit and not-for-profit services,[65] not the fine-line distinctions advanced by some commenters. Accordingly, if a service is offered commercially, whether incidentally, by a for-profit manager in a shared-use

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[61] See, e.g., Comments of Lower Colorado River Authority, GN Docket No. 93-252, at 5-7; Nextel Comments at 8-9 nn.12-14; Comments of the American Petroleum Institute, GN Docket No. 93-252, at 6.

[62] See NABER Comments at 7.

[63] See Motorola Comments at 7.

[64] See 47 U.S.C. § 332(d)(1).

[65] Notice at 4.

arrangement, or otherwise, it should be deemed a "for profit" offering under the statute.[66]

B. The "Interconnected Service" Element is Satisfied Whenever a Service Permits End Users to Make and Receive Calls Transmitted Over the Public Switched Network

Contrary to the claims of some commenters, the definition of "interconnected service" does not depend on the means of interconnection or the amount or percentage of interconnected traffic.[67] In revising Section 332, Congress intended the term "interconnected service" to encompass any interconnection made by the service provider with the public switched network that permits end users to make and receive calls.[68] The Commission should therefore reject efforts to carve out exceptions to commercial mobile service status based on the use of "store-and-forward" and other "indirect" means of interconnection.[69]

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[66] Cf. Southwestern Bell Comments at 5-6 (proposing to define "for profit" based on "the intention [] to eventually make a profit, as evidenced by provision of a service for which compensation is received") (emphasis supplied).

[67] See RAM Mobile Data Comments at 4; Nextel Comments at 10; PageMart Comments at 5; Comments of Rockwell International Corporation, GN Docket No. 93-252, at 3.

[68] See AMTA Comments at 9 ("interconnected service" allows subscriber access by virtue of the public switched network); Bell Atlantic Comments at 8-10 ("interconnected service" encompasses services that enable a customer to send or receive messages to or from points in the public switched network).

[69] See, e.g., RAM Mobile Data Comments at 4-5. For similar reasons, the Commission should reject the absurd suggestion that, if a carrier exercises a right to interconnection to the public switched network, it may nonetheless retain its "private" status. See id. at 8.

While some commenters suggest the adoption of a threshold based on the percentage of interconnected service, there should be no de minimis threshold below which interconnected service would be deemed a private mobile service.[70] Otherwise, entities would manipulate their percentage of interconnected service to avoid regulation as commercial service providers. If the service permits end users to initiate and terminate communications to telephones and other devices connected to the public switched network, the service should be regulated as a commercial mobile service.[71]

Finally, the Commission should confine the definition of "public switched network" to the facilities of landline exchange and interexchange carriers. While several commenters urge the Commission to anticipate the day when a national wireless network is reality, there is no evidence that Congress intended the phrase "public switched network" to encompass the facilities of mobile service providers.[72] Certainly, the fact that Congress classified commercial mobile service providers as common carriers does not mean that Congress intended the phrase "public switched

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[70] Cf. Geotek Comments at 8.

[71] McCaw Comments at 17; Comments of Sprint Corporation, GN Docket No. 93-252, at 5 [hereinafter "Sprint Comments"]; CTIA Comments at 9.

[72] NYNEX Comments at 9 ; Comments of Pacific Bell and Nevada Bell, GN Docket No. 93-252, at 5. Compare Notice at ¶ 22 (noting Congress's interchangeable use of the phrase "public switched network" with the traditional phrase "public switched telephone network" used to refer to the existing local and interexchange carrier network).

network" to encompass the facilities of all commercial mobile service providers.[73] To the contrary, such an expansive definition of "public switched network" would constitute a significant departure from the ordinary meaning of the phrase, requiring at least some evidence of legislative intent. The Commission should apply the ordinary meaning of "public switched network" to encompass services interconnected with the local and interexchange landline network.[74]

C. Because a Service May Be "Available to the Public", Despite Limitations on System Capacity, Geographic Coverage, or User Eligibility, The Commission May Not Categorically Exempt Such Services

As the record in this proceeding makes clear, the definition of "commercial mobile service" was intended to include services that are generally available to the public, as well as limited eligibility services that are available to a significant segment of the public.[75] While some commenters claim that interconnected services targeted to specific user groups constitute private mobile services,[76] the legislative history

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[73] Compare Sprint Comments at 7.

[74] See also PageNet Comments at 10; Motorola Comments at 7-8.

[75] See, e.g., CTIA Comments at 10-11; NYSDPC Comments at 7.

[76] Comments of Reed, Smith Shaw & McClay, GN Docket No. 93-252, at 5; Nextel Comments at 12; E.F. Johnson Comments at 7.